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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JACKIE CALVIN, et al.,

Plaintiffs and Respondents,

v.

SOLO 1 KUSTOMS, INC., et al.,

Defendants and Appellants.

B282226

(Los Angeles County  
Super. Ct. No. KC067619)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan Thomas Oki, Judge. Modified and affirmed.

John F. Bazan for Plaintiffs and Respondents.

Morris & Stone and Aaron P. Morris for Defendants and Appellants.

Defendants and appellants Solo 1 Kustoms, Inc. (Solo) and Joe Hernandez (Hernandez) (collectively, Defendants) appeal a judgment awarding damages to plaintiffs and respondents Jackie and Eddie Calvin (the Calvins), Albert Hinojos (Hinojos), Luis Manuel Rios Ciriaco (Ciriaco), and Armando Vazquez (Vazquez) (collectively, Plaintiffs) following a bench trial.

We modify the judgment by striking the award of punitive damages because Plaintiffs failed to present substantial evidence of Defendants' financial condition. As modified, the judgment is affirmed.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The Calvins, Hinojos, Ciriaco and Vazquez filed suit against Solo, an automotive repair shop, and its owner, Hernandez. The complaint pled causes of action for breach of contract, fraud, conversion, and unfair competition (Bus. & Prof. Code, § 17200). Plaintiffs alleged, inter alia, that Defendants had a practice of quoting a certain sum of money and a deadline by which to complete repairs, Defendants would disassemble the vehicles and then fail to complete the repairs within the agreed upon time, Defendants would demand additional money to complete the work, and Plaintiffs were then left with the option of paying additional money or having the disassembled and worthless vehicles returned to them.

Following a bench trial, the trial court found the work performed by Defendants was of no value to Plaintiffs, and ordered Defendants to pay the following damages: to the Calvins, \$8,000 in compensatory damages and \$10,000 in punitive damages; to Hinojos, \$26,300 in compensatory damages and \$10,000 in punitive damages; to Ciriaco, \$13,260 in compensatory damages and \$10,000 in punitive damages; and to Vazquez,

\$6,800 in compensatory damages and \$5,000 in punitive damages.

Defendants unsuccessfully moved for a new trial. Defendants thereafter filed a timely notice of appeal from the judgment.

### **CONTENTIONS**

Defendants contend: (1) the evidence is insufficient to support any award of compensatory damages; (2) Plaintiffs should not have been permitted to introduce evidence of damages after failing to identify any damages in their discovery responses; (3) there was no evidence to support a judgment against Hernandez in his individual capacity; (4) Plaintiffs cannot recover any damages due to their failure to mitigate their losses; and (5) the evidence is insufficient to support the award of punitive damages.

### **DISCUSSION**

1. *No merit to Defendants' challenge to the sufficiency of the evidence to support the awards of compensatory damages.*

Defendants contend the damages awarded were excessive and the evidence is insufficient to support the damages that were awarded to each of the Plaintiffs.

It is established that appellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it “‘are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.’ [Citations.]” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; accord, *Shenouda v. Veterinary Medical Bd.* (2018) 27 Cal.App.5th 500, 514.) Here, Defendants have failed to support their argument with the necessary citations to the

record, and have not set forth all the material evidence on the point. Therefore, this court may treat the issue as having been forfeited. (*Shenouda*, at p. 515.)

In any event, Defendants' challenge to the sufficiency of the evidence to support the individual awards of compensatory damages is meritless. We are guided by the premise that the amount of damages is a fact question and an award of damages will not be disturbed on appeal if it is supported by substantial evidence. (*Rony v. Costa* (2012) 210 Cal.App.4th 746, 753.) Further, the "opinion of an owner of personal property is in itself competent evidence of the value of that property, and sufficient to support a judgment based on that value. [Citations.]" (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921.)

As explained below, substantial evidence supports the compensatory damages that the trial court awarded after it determined "there was no value for the work performed by [Defendants]."

a. *The award of \$8,000 to the Calvins.*

Jackie Calvin testified as follows: She took her 1964 Riviera to Solo to make it operable. Hernandez told her he would charge her \$5,000 to put it in running condition. The Calvins agreed and paid Hernandez \$5,000 in cash, in advance. Hernandez then requested an additional \$5,879 for additional items that he said were needed to make the car run. The Calvins paid him an additional \$3,000. Hernandez then refused to continue working on the car until they paid him another \$2,879. The Calvins declined to pay and recovered the vehicle from him. Despite having paid \$8,000 to Hernandez, the car still was not running and had to be towed.

This testimony supports the \$8,000 award to the Calvins.

b. *The award of \$26,300 to Hinojos.*

The evidence established the following: Hinojos took his 1972 Chevy Nova to Solo for repairs and upgrades. The vehicle was in running condition at the time. The agreed price for the work was \$23,000. Hinojos paid Hernandez \$10,000 in cash and also gave him another vehicle worth \$13,000. Hernandez then demanded more money for the work, which ultimately cost Hinojos a total of \$26,300. Hernandez assured Hinojos that the Nova would be worth \$40,000 when finished, which influenced Hinojos to enter into the agreement. When Hinojos picked up the vehicle it was not driveable and only has salvage value.

This evidence supports the \$26,300 award to Hinojos.

c. *The award of \$13,260 to Ciriaco.*

The evidence showed as follows: Ciriaco took his 1951 GMC truck to Solo for a \$4,500 repair. Hernandez persuaded Ciriaco to agree to \$16,000 in repairs. Ciriaco paid \$11,100 in cash and worked for Hernandez for 27 days at the rate of \$80 per day, to be applied to the invoice amount, for a total payment by Ciriaco of \$13,260. At the time of trial, the truck remained in Hernandez's shop.

This evidence supports the award of \$13,260 in damages to Ciriaco.<sup>1</sup>

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<sup>1</sup> In addition to the award of damages, the trial court directed Defendants to disgorge and return the GMC truck to Ciriaco. (Bus. & Prof. Code, § 17203.)

d. *The award of \$6,800 to Vazquez.*

Vazquez took his 1979 Camaro to Solo for repairs. At the time, the vehicle was in good condition. Vazquez paid Solo \$9,800 to repaint the car and replace the motor with a more powerful one. Instead of replacing the motor, Solo simply repainted the existing motor. Also, the new paint job was defective and was showing cracks in the paint, Solo removed the original grille from the Camaro and replaced it with an aftermarket grille, and also removed and replaced Vazquez's \$1,800 custom wheels without his approval.

This evidence supports the \$6,800 award to Vazquez.

2. *No merit to Defendants' contention that the trial court erred in allowing damages testimony that contradicted Plaintiffs' interrogatory responses.*

Defendants assert that Plaintiffs should not have been permitted to introduce evidence of damages after failing to identify any damages in their discovery responses. Defendants contend it "was error for the court, over the objection of Defendants, to award damages when none were identified in discovery or at trial." The argument is meritless.

By way of background, during the cross-examination of Hinojos, the following colloquy occurred:

"Q. . . . I direct your attention to special interrogatory number 51. [It] asks you to set forth all facts upon which you relied in support of your allegation that you've been damaged in an amount to be proven at trial. Do you see that?

"A. Yes.

"Q. Turn to exhibit 161 [Hinojos's responses to special interrogatories], the second page.

“Mr. Morris [counsel for Defendants]: Then I’ll represent to the Court there was no answer, just an objection.

“The Court: Mr. Morris, if you’re going to go along these lines without a motion to compel further responses, this is pretty much in a vacuum to me. *His responses [to] the form interrogator[ies indicated] he sustained damages.* He didn’t put down how much it was. But there was no motion to compel an answer to that subsection. The same here, he objected but there was no motion to compel an answer.

“Mr. Morris: Well, I would submit, your honor, it’s not our burden of proof to move to compel. If we’re given an answer that matches our theory of the case, in other words, we don’t believe there are really any damages they were able to identify.

“The Court: I assume you’re going to file a brief. *The fact of the matter is in discovery, as the plaintiff indicated, he sustained damages.* Where he didn’t answer how much that was, there was no motion to compel.

“Mr. Morris: Thank you. For that direction, your honor.”  
(Italics added.)

We perceive no error in the trial court’s ruling. With respect to the amount of damages, Hinojos’s interrogatory responses cited the \$23,000 work order for his Chevy Nova. Therefore, the record belies Defendants’ assertion that Hinojos’s discovery responses established that he did not incur any damages. Accordingly, we reject Defendants’ contention that “it was error for the trial court . . . to award damages when none were identified in discovery[.]”

As the trial court pointed out, if Defendants believed that Hinojos’s interrogatory responses were evasive or incomplete, Defendants could have moved for an order compelling a further

response. (Code Civ. Proc., § 2030.300.) Defendants did not do so. At this juncture, Defendants appear to be arguing that the trial court should have imposed an evidence sanction, prohibiting Plaintiffs from “introduc[ing] evidence of damages.” However, an evidence sanction may be imposed only after a party “fails to obey an order compelling further response to interrogatories.” (*Id.*, at § 2030.300, subd. (e).) Because Defendants did not seek an order compelling further response, followed by an order imposing sanctions for noncompliance with a discovery order, there is no merit to their contention that Plaintiffs should have been precluded from presenting evidence of damages.<sup>2</sup>

3. *The trial court properly entered judgment against Hernandez in his individual capacity.*

The opening brief asserts in conclusory fashion that “[t]here was no evidence presented to support a judgment against . . . Hernandez in his individual capacity. Specifically, there is no discussion of the causes of action asserted against Hernandez, the evidence presented against him, or why it was error for the trial court to enter judgment against him. Therefore, the issue may be treated as waived. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 (*Falcone*); *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 (*Lincoln*).)

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<sup>2</sup> Defendants assert that in light of the trial court’s ruling with respect to Hinojos’s testimony, it would have been futile to object to the damages testimony of the other Plaintiffs or to take each of the remaining Plaintiffs through their discovery responses. Because the trial court properly received Hinojos’s testimony regarding his damages, Defendants have not shown the trial court erred in receiving the damages testimony of the other Plaintiffs, testimony which came in without objection.



In any event, the contention does not detain us. The corporate entity may be disregarded where there is “ ‘such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist.’ ” (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 777.) At trial, when asked “who’s Solo 1 Kustoms, Inc.?” Hernandez responded: “I am Solo 1 Kustoms, Inc.” Given Hernandez’s testimony that he and Solo are essentially one and the same, there is no merit to the contention that no evidence was presented to support a judgment against Hernandez in his individual capacity.

4. *No merit to Defendants’ contention that Plaintiffs cannot recover any damages due to their failure to mitigate their damages.*

Defendants contend that Plaintiffs cannot recover any damages due to their failure to mitigate, and that Plaintiffs failed to offer evidence of any effort to mitigate. The arguments are meritless.

A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take “reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided. [Citations.]” (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 41.) Whether “a plaintiff acted reasonably to mitigate damages . . . is a factual matter to be determined by the trier of fact[.]” (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 884.) The burden of proving that a plaintiff failed to mitigate damages is on the *defendant*. (*Ibid.*)

Accordingly, it was the Defendants who had the burden at trial to establish that Plaintiffs failed to take reasonable steps to mitigate their harm. It was the role of the trial court, sitting as

the trier of fact, to weigh the evidence and determine whether Defendants met their burden. And at this juncture, Defendants, as the appellants, have the burden to show prejudicial error in the trial court's ruling. (*Falcone, supra*, 164 Cal.App.4th at p. 822.)

In this regard, the appellants' opening brief cites solely to a single page of the reporter's transcript which shows the following: Hinojos testified that when he retrieved his vehicle from Solo, the VIN number was missing; the absence of a VIN number makes a car worthless; in an attempt to mitigate his damages he called the highway patrol and was advised that he could obtain a new VIN number, but it would not be the original VIN number; and the car therefore would have a reduced value. Defendants argue that Hinojos could have mitigated his damages by obtaining a new VIN number.

However, this lone testimony cited by Defendants does not establish that recovery of damages by Hinojos and the other Plaintiffs is barred by their failure to mitigate damages. Thus, Defendants have failed to show that the trial court erred in resolving the issue of mitigation of damages in favor of Plaintiffs.<sup>3</sup>

*5. Award of punitive damages must be stricken because Plaintiffs failed to meet their burden to establish Defendants' financial condition.*

*a. General principles.*

An award of punitive damages "cannot be sustained on appeal unless the trial record contains meaningful evidence of the

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<sup>3</sup> Defendants' other arguments with respect to Plaintiffs' alleged failure to mitigate their damages are not supported by citations to the record, and therefore are disregarded. (*Lincoln, supra*, 102 Cal.App.4th at p. 1239.)

defendant's financial condition.” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109 (*Adams*)). “Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive.” (*Id.* at p. 112.) The plaintiff bears the burden of proof on the issue. (*Id.* at p. 119.)

The “court in *Adams v. Murakami*, *supra*, 54 Cal.3d at page 116, footnote 7, declined ‘to prescribe any rigid standard for measuring a defendant’s ability to pay.’ Net worth is the most common measure, but not the exclusive measure. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621, 624–625 [evidence that defendant was ‘a wealthy man, with prospects to gain more wealth in the future’]; see *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582–583 [‘Net worth is too easily subject to manipulation to be the sole standard for measuring a defendant’s ability to pay’].) In most cases, evidence of earnings or profit alone are not sufficient ‘without examining the liabilities side of the balance sheet.’ [Citations.] ‘What is required is evidence of the defendant’s ability to pay the damage award.’ [Citation.] Thus, there should be some evidence of the defendant’s actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.” (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680 (*Baxter*)).

For example, in *Baxter*, the evidence showed the defendant owned one house, estimated to be worth \$700,000 to \$750,000, which generated monthly rental income of \$1,000, and another house, with an estimated value of \$800,000. However, there was no evidence as to whether either house was mortgaged or otherwise encumbered, and no evidence as to whether the rental income generated a net profit. (*Baxter*, *supra*, 150 Cal.App.4th at

p. 681.) *Baxter* reversed the punitive damages award, concluding that although the record showed that the defendant “own[ed] substantial assets, [the record was] silent with respect to her liabilities. The record [was] thus insufficient for a reviewing court to evaluate [the defendant’s] ability to pay \$75,000 in punitive damages.” (*Ibid.*)

b. *No evidence of Defendants’ ability to pay \$35,000 in punitive damages; the evidence merely showed that Defendants had certain assets.*

Plaintiffs assert the total award of \$35,000 in exemplary damages is justified based on Solo’s “net worth,” and they argue that Solo is a thriving business. However, Plaintiffs have not proven the amount of Solo’s net worth, and thus would have this court speculate that the \$35,000 award is appropriate and not excessive. (*Adams, supra*, 54 Cal.3d at p. 112.)

Plaintiffs also point to testimony that Hernandez and Solo own various vehicles, including a BMW valued at \$20,000 and a 1966 GTO worth more than \$50,000, as well as tools and machinery of unspecified value. However, evidence of assets, without evidence of liabilities, is insufficient for an appellate court to ascertain Defendants’ ability to satisfy the \$35,000 award of punitive damages. (*Baxter, supra*, 150 Cal.App.4th at pp. 680–681.) Therefore, the award of punitive damages cannot be upheld. Further, because the punitive damages award must be reversed due to Plaintiffs’ failure of proof, the issue is not subject to retrial. (*Id.* at p. 681.)

### **DISPOSITION**

The judgment is modified by striking the award of punitive damages, and as modified, the judgment is affirmed. The parties shall bear their respective costs on appeal.

### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

LAVIN, J.

MURILLO, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.